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Nos. 1272-1278

In the Supreme Court of the United States

OCTOBER TERM, 1944

UNITED STATES OF AMERICA, PETITIONER

v.

PEURY MOTOR COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

MERRILL J. BROCKBANK, DOING BUSINESS AS BROCKBANK APPAREL COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM G. GRIMSDELL, DOING BUSINESS AS GROCER PRINTING COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES F. WIGGS, DOING BUSINESS AS CHICAGO FLEXIBLE SHAFT COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

INDEPENDENT PNEUMATIC TOOL COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

THE GALIGHER COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

GRAY-CANNON LUMBER COMPANY

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1944

Nos. 1272–1278

UNITED STATES OF AMERICA, PETITIONER

v.

PETTY MOTOR COMPANY, ET AL.*

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgments entered in this case on March 5, 1945, by the United States Circuit Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Circuit Court of Appeals (R. 621–624) is reported in 147 F. 2d 912.

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*Besides the Petty Motor Company, the respondents are Merrill J. Brockbank, doing business as Brockbank Apparel Company; William G. Grimsdell, doing business as Grocer Printing Company; Charles F. Wiggs, doing business as Chicago Flexible Shaft Company; Independent Pneumatic Tool Company; the Galigher Company; and Gray-Cannon Lumber Company.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on March 5, 1945 (R. 625–626). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether tenants occupying property condemned by the United States for temporary use for a period longer than any of the existing leases are entitled to prove moving costs and consequential damages resulting from the moving as evidence of the value of their interests.

2. Whether month-to-month tenants are entitled, upon condemnation of the leased property by the United States, to compensation based upon such indefinite period of time as the jury should conclude the tenants might have continued to occupy the property.

STATEMENT

On November 9, 1942, the United States instituted proceedings under the authority of the Second War Powers Act of March 27, 1942, 56 Stat. 177, c. 199, Sec. 201 (50 U. S. C. App., Supp. III, Sec. 632), to condemn for temporary use by the Army a building in Salt Lake City, Utah, known as the Old Terminal Building. The estate sought was a leasehold interest expiring June 30, 1945, with the right of election on the part of the United States to surrender possession

on June 30, 1943, or June 30, 1944, upon giving sixty days' notice. (R. 3–5.)

The building, owned by W. B. Richards, Jr., who had purchased it in October 1942 (R. 179, 211) was partly vacant (R. 353), the remainder being occupied by various tenants. The owner and tenants were made parties to the proceedings (R. 3–5). Upon an order to show cause why immediate possession should not be granted, the trial court, on November 11, 1942, granted the Government exclusive possession and ordered the tenants to vacate their respective premises on certain dates between November 17 and December 1, 1942 (R. 5–8). The owner and seven of the ten tenants (R. 7) appeared and participated in the proceedings (R. 9–52, 89, 149). However, settlement was made with the owner and the appeals in the court below related only to claims of the tenants.[1] Five of the tenants—the Galigher

[1] At a pre-trial conference the Government contended that its liability is limited to the reasonable rental value of the entire building; that when such value of the single property has been determined and paid into court, the Government's obligation is discharged; and that it is not concerned with the apportionment and distribution which thereafter is made between the owner and the various tenants (R. 116, 118–120). See *United States* v. *Dunnington*, 146 U. S. 338, 350–353; *Carlock* v. *United States*, 53 F. 2d 926, 927 (App. D. C.); *Silberman* v. *United States*, 131 F. 2d 715, 717 (C. C. A. 1); *Meadows* v. *United States*, 144 F. 2d 751, 752–753 (C. C. A. 4) and cases there cited. The district court ruled that there were separate issues between the Government and the owner and the Government and the tenants (R. 38; see R. 136–141). Subsequently, a settlement was reached with the owner whereby he leased the property to the United States, no

Company (R. 245), Grocer Printing Company (R. 158), Chicago Flexible Shaft Company (R. 218), Brockbank Apparel Company (R. 382) and Gray-Cannon Lumber Company (R. 323)—had no written leases but were in possession on a month-to-month basis. The Independent Pneumatic Tool Company had a written lease which provided that the term and all rights under the lease would terminate if possession of the premises was taken by a federal, state, or other public authority for public use (R. 201–202). The Petty Motor Company had a written lease of the basement of the building for a term of one year beginning October 31, 1942, with the right to renew for another year (R. 433–436).

At the trial before a jury, all of the tenants introduced evidence of the expenditures incurred in moving out of the Old Terminal Building, renovating and remodeling the premises to which they moved, and reinstalling equipment at the new premises, and the increased rents they were required to pay at their new premises[2] (*e. g.*, R.

reference being made to claims of the lessees. The court ordered dismissal of the proceedings as to the owner but no formal judgment has been entered thereon (R. 568–569).

[2] Some of the tenants introduced evidence of increased rents for the duration of the leases which they claimed they had to execute to obtain their new premises (from one to five years) (R. 186, 195, 230, 269), whereas one tenant who executed a one-year lease for his new location claimed increased rent for 31 months (the duration of the term taken by the United States) (R. 393, 395–396).

184–186, 198, 230, 268–269, 325–336, 394–395, 459). In addition, F. Orin Woodbury, a real estate agent, testified on behalf of the Grocer Printing Company, the Chicago Flexible Shaft Company, the Galigher Company, and the Independent Pneumatic Tool Company (R. 291–294). Although admitting on cross-examination that a month-to-month tenancy could not be sold in the market (R. 312), this witness expressed the opinion that the "value" of such tenancies was $4,500, $7,500 and $12,500 (R. 293–294). In arriving at this opinion of value he considered the difference between the rents formerly paid at the Old Terminal Building and those paid at the premises to which the tenants moved, the cost of moving and re-installing equipment, the cost of renovating or remodeling the new premises, the comparison between the Old Terminal Building and the new premises, the length of time the tenant had occupied the Old Terminal Building, the locality and the business carried on (R. 293–294, 314). Basing his opinion upon similar considerations, Woodbury valued the interest of Independent Pneumatic Tool Company at $3,500 (R. 293). Besides the moving costs, Gray-Cannon Lumber Company and the Petty Motor Company introduced evidence of the rental value of their premises (R. 335, 455, 471). Two witnesses for the Government testified that the reasonable rental value of each of the tenant's

premises was no more than the rent being paid at the time of the taking (R. 481-486, 517-518, 539).

At the beginning of the trial, in overruling the Government's blanket objection to all evidence on behalf of the month-to-month tenants and to all evidence of removal costs, the trial court told the jury that whether the tenants had had term leases or occupied the premises from month to month, the measure of their damages would be for the jury to determine; that while the primary question was the loss which each tenant sustained, it would be for the jury to decide whether the measure of damages for the loss should or should not be based upon the cost of moving, the increase in rent, and similar matters (R. 158–161; see also R. 154–155, 167, 172, 195, 223, 287, 297, 323–324, 325, 391–392, 393–394, 444, 447). At the close of the testimony, the trial court instructed the jury to the effect that the tenants' "rights of occupation" had been taken; that such rights, whether under a lease or a month-to-month tenancy, were property rights for which compensation must be paid; and that the measure of just compensation was for the jury to determine considering all the evidence, such as the length of time the building had been occupied by the tenant, the cost of moving, the cost of remodeling and renovating their new premises, the increased rent, whether they were better or worse off in their new premises than in the

Old Terminal Building, etc. (R. 569–574). The Government's objections to the charge were overruled (R. 575–576). Separate verdicts were returned for each tenant and judgments were entered thereon totalling $10,360 (R. 53–66).

Appeals taken by the United States from the judgments thus entered were briefed and on March 14, 1944, submitted upon oral argument to the circuit court of appeals. No action was taken pending a decision by this Court in *United States* v. *General Motors Corp.*, 323 U. S. 373. After the *General Motors* case was decided, supplemental memoranda were filed and, on March 5, 1945, the circuit court of appeals affirmed the judgments of the district court (R. 624). In so doing the court below relied entirely on this Court's decision in the *General Motors* case, which was construed as holding that wherever less than fee simple title is condemned the established rule denying recovery of "consequential damages" does not apply (R. 624).

REASONS FOR GRANTING THE WRIT

1. The United States condemned the Old Terminal Building for a period expiring June 30, 1945, with the right to surrender possession on June 30, 1943, or June 30, 1944, upon giving 60 days' notice (R. 3–5). The court below conceded that "the lease acquired by the government was for a term extending beyond the expiration of the lease owned by each of the tenants, with the ex-

ception of the lease owned by the Independent Pneumatic Tool Company, and possibly with the exception of the lease owned by the Petty Motor Company" (R. 624). However, it held that the principles announced in *United States* v. *General Motors Corp.*, 323 U. S. 373, were controlling whenever the United States condemns less than the fee simple title and consequently that the district court was correct in allowing the jury to consider the costs incurred by all of the tenants in moving, the cost of renovating and remodeling the premises to which they moved, the cost of reinstalling equipment and the increased rents they were required to pay at their new premises (R. 624). The Government carefully objected to the introduction of such evidence, as the following colloquy between the district court and Mr. Clay, counsel for the Government, reveals (R. 159, 161):

> MR. CLAY. Mr. Jones [counsel for four of the respondents] suggests we make a blanket objection to any evidence which would support or might tend to support any of the allegations of the answer. If that is not too broad and the court wants to rule on it now, we will except, and won't interrupt any more.
>
> The COURT. It may be so understood, it being understood that your objection goes to the proposition that because they did not have a term lease they are not entitled to recover anything.

MR. CLAY. That plus the fact that under no circumstances would they be entitled to recover the expense of moving or any expense incurred in the new location.

* * * * *

THE COURT. You object to all that [evidence of cost of moving, the difference in rent, the cost of reinstalling equipment, etc.] because they didn't have a lease, term lease?

MR. CLAY. That is right.

THE COURT. It may be so understood. [See also R. 154–155, 167, 172, 195, 223, 287, 323–324, 325, 391–392, 393–394, 444, 447.]

In the *General Motors* case, the question was what is the proper measure of compensation when the temporary occupancy of a building is taken from a tenant holding under a long term lease who is obligated to continue paying rent under the terms of his lease during the Government's occupancy and who presumably would return to the building upon the termination of the Government's use. The decision in that case not only reaffirmed the rule that the expense of moving removable fixtures and personal property from the premises and other like consequential losses cannot be considered when the United States condemns the fee, but it also held that "When it [the Government] takes the property, that is, the fee, the lease, whatever he [the citizen] may own, *terminating altogether his interest,* under the es-

tablished law it must pay him for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of 'consequential damage' as that conception has been defined in such cases." [Italics supplied.] 323 U. S. at pp. 379–380, 382. It is only "when the Government does not take his entire interest, but by the form of its proceeding chops it into bits * * * and leaves him holding the remainder" that the cost of moving out is to be considered in determining "what would be the market rental value of such a building on a lease by the long-term tenant to the temporary occupier" (323 U. S. at p. 382).

The entire interests of the tenants in this case have been taken. They will have no terms remaining after the temporary occupancy condemned by the Government expires. They are in the same position they would have occupied had the Government taken the fee. Consequently the decision of the court below, rather than being supported by this Court's decision in the *General Motors* case, is contrary to it.

A word should be added concerning two of the leases. As has been said, the court below conceded that the entire term of most of the tenants had been taken, but it held that the Independent Pneumatic Tool Company lease and "possibly" the Petty Motor Company lease were for terms longer than the temporary use taken by the Gov-

ernment (R. 624). The Independent Pneumatic lease provided that:

> If the whole or any part of the demised premises shall be taken by Federal, State, county, city, or other authority for public use, or under any statute, or by right of eminent domain, then when possession shall be taken thereunder of said premises, or any part thereof, the term hereby granted and all rights of the Lessee hereunder shall immediately cease and terminate, and the Lessee shall not be entitled to any part of any award that may be made for such taking, nor to any damages therefor except that the rent shall be adjusted as of the date of such termination of the Lease. (R. 202).

A tenant whose lease provides for its termination upon a sale of the property by the owner or upon the taking of the leased premises for a public use, is entitled to no compensation when it is condemned.[3] Although the court below referred (R.

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[3] *United States* v. *Improved Premises*, 54 F. Supp. 469 (S. D. N. Y.); *United States* v. *Certain Parcels of Land in Loyalsock Township, Etc.*, 51 F. Supp. 811, 812 (M. D. Pa.); *United States* v. *Inlots*, 26 Fed. Cas. No. 15441a, at page 492 (C. C. S. D. Ohio); *Goodyear & Co.* v. *Boston Terminal Co.*, 176 Mass. 115; *In re Improvement of Third Street*, 178 Minn. 522; *Matter of Mayor of New York*, 168 N. Y. 254; *In re Water Front in Tompkinsville, Etc.*, 219 N. Y. App. Div. 387; *Scholl's Appeal*, 292 Pa. 262; see *In re Water Front*, 246 N. Y. 1, 31–34, certiorari denied, 276 U. S. 626; cf. *Zeckendorf* v. *Cott*, 259 Mich. 561; *United States* v. *3.5 Acres of Land in South Boston, Mass.*, 57 F. Supp. 548 (D. Mass.); *American*

622) to this clause in the lease of Independent Pneumatic Tool Company, it did not give any reason or cite any authority to support the view that, despite this clause, the tenant's interest was not terminated by condemnation. The *General Motors* case does not warrant such repudiation of a lease clause as to permit a tenant whose interest has terminated to secure compensation. *United States* v. *21,815 Square Feet of Land in Borough of Brooklyn*, 59 F. Supp. 219 (E. D. N. Y.).

The Petty Motor Company had a lease for one year expiring October 31, 1943, with the right to renew for another year (R. 433–436). The Government took the premises until June 30, 1945, but it could have surrendered possession on June 30, 1943 or 1944 (see R. 3–5). The circuit court of appeals stated that this lease was a "possible" exception to those which terminated prior to the expiration of the use taken by the United States. However, because of the construction given to the

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Creameries Co. v. *Armour & Co.*, 149 Wash. 690; *Boston* v. *Talbot*, 206 Mass. 82. Many of these decisions arose on apportionment of the total award for the property between the owner and his tenant. In view of the fact that the settlement made with the landlord in the instant case did not require the owner to indemnify the Government from claims of lessees (cf. *Loyalsock Township* case, *supra*, p. 11), the United States does not deny that it is primarily liable to the tenants. It does contend, however, that the measure of the tenants' recovery against the Government is the same as it would be upon apportionment of an award representing value of the entire property.

General Motors decision, the court below did not pass upon this question. It is submitted that the taking by the United States of more than 31 months' occupancy (from November 11, 1942, through June 30, 1945) terminated altogether the Petty Company's interest, even though the Government's occupancy might have been relinquished earlier. The Petty Company would of course be entitled to compensation for the remainder of its lease, which had almost a year (November 11, 1942–October 31, 1943) to run.

Moreover, the court below held that whenever less than fee simple title is condemned the established rule denying recovery of "consequential damages" does not apply. It apparently believed the *General Motors* decision limited cases such as *Mitchell* v. *United States*, 267 U. S. 341, to instances where fee title is taken. See R. 624. On the contrary, in the *General Motors* case, this Court held that even when, as there, a temporary period for less than the term of an existing lease was taken "proof of value peculiar to the respondent, or the value of good-will or of injury to the business of the respondent * * * must be excluded from the reckoning" (323 U. S. at p. 383). Many of the items which the lessees were permitted to introduce in evidence, despite the Government's objections, represented consequential damages rather than expenses of moving their property out of the premises.[4] This aspect of the

[4] For example, the jury was permitted to consider the increased rent which a month-to-month tenant of the Old Terminal Building had to pay for 5 years under a lease for his new premises (R. 186), the cost of remodeling the new

decision reflects, it is believed, a further misapprehension of the *General Motors* case, and calls for review by this Court.

2. An additional question is raised by the treatment of the month-to-month tenancies. Although recognizing that these tenancies might be terminated at any time by the owner upon 15 days' notice, the district judge did not limit the compensation of those tenants to the value, if any, of their actual term (see R. 140–141; 570–571). Instead, he instructed the jury that while the tenancies were uncertain, they might last a long time, "for years and years and years" (R. 571) and submitted for determination by the jury "What length of time would that occupation fairly and reasonably cover, * * *" (R. 574).[5] The circuit court of appeals, referring to the fact that the tenants had occupied their premises for many years, that the arrangement was mutually satisfactory to the tenants and the owner, and that the tenants had every reason to think they could remain indefinitely, charac-

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premises (R. 167, 196, 228), the cost of renovating a sign used by a tenant at the old premises which "was kind of worn out, been up for a long time" (R. 177), the cost of photographs of a tenant's new location to send to the main office of the company (R. 200–201), and the cost of changing advertising cuts (R. 256).

[5] This instruction related only to the tenancies from month to month. The tenants claiming under written leases were permitted to recover only for the unexpired terms of their leases (R. 572).

terized the claimants as "long-time tenants" and stated that "the record justifies the conclusion that each would have continued for an indefinite period had not the government begun condemnation proceedings" (R. 622).

These rulings disregard the fact that the just compensation provision of the Fifth Amendment is concerned solely with property rights. The United States is not required to compensate persons who do not possess enforceable rights but might possibly or probably be permitted to occupy or use property.[6] As Mr. Justice Holmes pointed out in *Emery* v. *Boston Terminal Co.*, 178 Mass. 172, 185, where compensation was claimed on the basis of a custom over a period of 35 years to renew a lease whenever it expired: "Changeable intentions are not an interest in land, and although no doubt such intentions may have added practically to the value of the petitioners' holding, they could not be taken into account in determining what the respondent should pay. They added nothing to the tenants' legal rights, and legal rights are all that must be paid for. Even if such intentions added to the saleable value of the lease, the addition would represent a speculation on a chance, not a legal right." In fact, tenants from month to month have been said not to have such an interest in

[6] The proper measure of compensation is of course a question of law which cannot be submitted to the jury, as was done by the trial court in this case (R. 159–160, 570, 576).

property condemned as to be entitled to any compensation. "The claim of a tenant in a condemnation proceeding is for the market value of the unexpired term of the lease. A month to month tenant * * * would have no such unexpired term and therefore would not be entitled to any award." *United States* v. *Certain Lands, Etc.*, 39 F. Supp. 91, 99 (E. D. N. Y.); cf. *Hanna* v. *County of Hampden*, 250 Mass. 107; *Tate* v. *State Highway Com'n*, 226 Mo. App. 1216; *Lyons* v. *Philadelphia & Reading Ry. Co.*, 209 Pa. 550. We feel that, in view of their right to 15 days' notice, the month-to-month tenants would at best be entitled to compensation for whatever portion of the 15 days remained after the period between November 11, 1942, and their dispossession.[7]

3. The questions presented are of large importance to the Government in its acquisition and use of property for war purposes. Frequently space is needed for office purposes or for housing military personnel during the war which will not be required for permanent use. Accordingly, the temporary use of a large number of buildings, such as apartment houses and office buildings, has been taken.[8] Very often such buildings are oc-

[7] The Government was granted immediate possession on November 11, 1942, and the tenants were ordered to vacate on certain dates between November 17 and December 1, 1942 (see Statement, *supra*, p. 3).

[8] See S. Rep. No. 10, part 16, 78th Cong., 2d sess., p. 121. This is done pursuant to the policy expressed by Congress

cupied by tenants at will, tenants from month to month or tenants for other short periods less than the time for which the buildings are condemned. The result of the rulings of the courts below in this case is that when the United States condemned the only available space which would meet its requirements "and at the same time disturb the fewest possible tenants" (R. 373–374), it was required to pay a total of $10,000 to six tenants in addition to paying the owner the full rental value of the building. Application of the view of the court below would produce similar results in numerous other cases.

CONCLUSION

For the foregoing reasons, the petition for writs of certiorari should be granted.

Respectfully submitted.

HUGH B. COX,
Acting Solicitor General.

MAY 1945.

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in the Military Appropriations Act of 1945, Pub. No. 374, 78th Cong., 2d sess. (June 28, 1944) that property should be purchased "only when it would be more economical to purchase than lease, if leasing be possible, in cases where doubt prevails as to the land desired being permanently needed for military purposes."

U. S. GOVERNMENT PRINTING OFFICE: 1945